SUPREME COURT, U. S.
FILED
JAN 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1082

CINCINNATI DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO, ET AL., *Petitioners,*

v.

CITY OF CINCINNATI, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	2
Statement of the Case	2
A. Proceedings in the Court of Common Pleas	2
1. The Injunction and the Order to Show Cause	2
2. The Evidence on Liability	6
3. The Trial Court's Decision and Judgment	8
B. Proceedings on Appeal	8
Reasons for Granting the Writ	10
I. The Courts Below Denied Petitioners Due Process of Law in Its Primary Sense	10
II. The Issue Posed in This Case Is of Recurring and General Importance	16
Conclusion	19
APPENDIX	1a

INDEX OF CITATIONS

CASES:

Baldwin v. New York, 399 U.S. 66	18
Bell v. United States, 349 U.S. 81	16
Bloom v. Illinois, 391 U.S. 194	18
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673	16
Brotherhood of Loc. Fire & Eng. v. Bangor & Aroostook R. Co., 380 F.2d 570 (C.A.D.C.), cert. denied on other issues, 389 U.S. 327	16

Page

Chapman v. California, 386 U.S. 18 13
Cheff v. Schnackenberg, 384 U.S. 373 18
Codispoti v. Pennsylvania, (#73-5615), cert. granted December 3, 1973, 42 U.S.L.Wk. 3333 .....17, 19
Cooke v. United States, 267 U.S. 517 .....9, 10
Gompers v. Bucks Stove & Range Co., 211 U.S. 418 .. 14
Griffin v. California, 380 U.S. 609 14
Groppi v. Leslie, 404 U.S. 496 .....11, 19
Morgan v. United States, 304 U.S. 1 11
Russell v. United States, 369 U.S. 749 12
Taylor v. Hayes, (#73-473) cert. granted December 3, 1973, 42 U.S.L.Wk. 3333 17
United States v. Cruikshank, 92 U.S. 542 12
United States v. Seale, 461 F.2d 345 (C.A. 7) 18
United States v. United Mine Workers, 330 U.S. 258 .. 10

UNITED STATES CONSTITUTION:

Fifth Amendment 2, 9, 11, 12
Sixth Amendment 2, 12
Fourteenth Amendment 2

OHIO CONSTITUTION:

Art. I § 5 10

JUDICIAL CODE:

28 U.S.C. § 1257(3) 2

OHIO REV. CODE:

§ 733.581 4

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Cincinnati District Council 51, American Federation of State, County, Municipal Employees, AFL-CIO, and American Federation of State, County, Municipal Employees, AFL-CIO, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Ohio are reported at 35 Ohio State 2d 197, 299 N.E. 2d 686. They are reprinted in App. A *infra*. The opinion of the Court of Appeals, First Ap-

pellate District, is not reported; it is reprinted in App. C *infra*. The decision and judgment of the Court of Common Pleas of Ohio, Hamilton County, are not officially reported. They are reprinted in App. D *infra*.

JURISDICTION

The decision of the Supreme Court of Ohio was issued on July 18, 1973, and a timely petition for rehearing was denied on September 6, 1973, App. B *infra*. By orders dated November 21, 1973, and December 20, 1973, Mr. Justice Stewart extended the time for filing this petition for certiorari to January 4, 1974, and further to January 9, 1974. This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Where an order to show cause charges only that the defendants were in civil contempt of an injunction, may defendants be subjected to civil and criminal penalties for more than thirty separate violations?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth, Sixth and Section 1 of the Fourteenth Amendments to the Constitution of the United States. They are reprinted in App. F *infra*.

STATEMENT OF THE CASE

A. Proceedings in the Court of Common Pleas.

1. The Injunction and the Order To Show Cause.

This case arises out of an action for an injunction, brought on January 4, 1970, by the City of Cincinnati against Cincinnati District Council 51, American Federation of State, County, Municipal Employees, AFL-CIO (hereafter "Council 51"), its officers and six local

unions affiliated with Council 51 and their officers, to enjoin them from engaging in a strike against the City (R. 1-5).[1] Petitioner American Federation of State, County and Municipal Employees, AFL-CIO (hereafter "the International") is an International union with which Council 51 is affiliated. The International was not a party to the injunction action. On January 4, 1970 a temporary restraining order was issued by the Court of Common Pleas (R. 5).

On January 6, a final judgment and permanent injunction was entered by Judge Morrissey "restraining and enjoining the defendants from carrying on a strike and/or picketing against the City of Cincinnati (R. 7)." On January 7, 1970, upon charges by the City alleging violation of the temporary restraining order on January 5 and 6 (R. 10), ten individuals and Council 51 were held in contempt and were fined in amounts ranging from $200 to $500 and sentenced to the workhouse, the jail sentences being suspended in some cases (R. 13). Council 51, in addition to being fined $200, was required to post a security bond of $7,800 consisting of checked-off Union dues then being held by the City for the account of Council 51 (R. 14).

The strike continued. On February 5, 1970 a settlement agreement was arrived at by Council 51 and the City Manager (R. 206). Following ratification of the agreement, employees started to return to work on Sunday. February 8 and all were back by February 9 (R. 140). The February 5 agreement provided, *inter alia,* for the dismissal of the injunction action, the dissolution of the injunction and a joint request to the

[1] R. is a reference to the printed "Record" in the Supreme Court of Ohio.

Court by the City and Council 51 for the dismissal of all pending contempt proceedings arising out of said injunction and the remission of all contempt sentences and other penalties against any employees or union representatives for the alleged violation of said injunction (R. 206).

On February 6, 1970 an Application to Intervene (R. 17) was filed by respondent Goldberg, a taxpayer, pursuant to § 733.581 of the Ohio Revised Code (R. 21), to recover in behalf of the City, damages it had allegedly suffered as a result of the defendants' violation of the injunction. This application was opposed by Council 51 and the City, but was granted without opinion.

On June 26, 1970 Intervenor instituted a new contempt proceeding by motion for an order to show cause directed against defendant Council 51, all of the local unions and the thirty-three individuals who had been named as defendants in the original complaint, plus petitioner International and two of its representatives (R. 55). This was the first time the International became a party. The motion requested that said persons and organizations show cause why they should not be held in contempt, why they should not be punished for *"such contempt"* and why they should not be required to pay damages to the City of Cincinnati.[2] On August 25, 1970 the Court issued an order (R. 62-64) reprinted in full as App. E *infra*. That order required the named persons and organizations to show cause why they should not be "held in contempt for violating this Court's permanent injunction" and why they should not pay "damages to the plaintiff for civil contempt

[2] R. 56, emphasis added here, and throughout this Petition unless otherwise specified.

in such amount, if any, as the Court may find *such violation* has damaged plaintiff".

At the time of the return of the Order to Show Cause, at a conference in the Court's chambers, defendants requested specifications of the contempt charges. Intervenor's counsel indicated that he might provide them, but he never did. Accordingly, at the commencement of the contempt hearing on September 21, 1970, defendants moved to dismiss on the ground that the supporting affidavit was insufficient since "it does not apprise the parties affected with any information as to the act which they are alleged to have committed which is said to be in contempt"; "that this is essentially a criminal proceeding, the accused are entitled to know what they are charged with that constitutes alleged contempt", and that the proceeding be dismissed unless specifications were provided forthwith "so that we know what we are charged with" (R. 64-66). Intervenor refused to provide any specifications, stating that "The contempt of Court continued from the beginning to the end" and that "to specify details would take away from the claim" (R. 66); he stated further, that the court should award damages to the City "against these organizations and individuals because of their continuous violation of the court order, by their participating in the strike, encouraging the strike, up until the time of concluding. Therefore the details are unnecessary" (R. 66). The motion for specifications of the charge and, in the alternative, to dismiss was overruled (id.).

During the course of the trial the Court dismissed the proceedings with respect to all of the named individuals and the case proceeded solely against the named labor organizations.

2. The Evidence on Liability.

In the contempt proceedings there was no dispute about Council 51's participation in the strike and hence its violation of the injunction. The only controverted issue of liability was whether the International was in contempt of the injunction.[3]

We now set forth the evidence adduced against the International:

The strike was called on January 4 and began on January 5 (R. 10). The International was in no way involved in the calling of the strike (R. 169). The International learned that a strike had started within twenty-four hours (R. 170) but there was no evidence, direct or circumstantial, as to when the International first had notice of the injunction.

Some time after January 5, the exact date being unproved, the International sent representatives Epps and Brindza to Cincinnati with instructions to try to bring the dispute to a speedy conclusion (R. 68, 171). Each of these representatives was in Cincinnati for a part of the time during the strike, but the dates were not proven. Van Hagen, the Director of Council 51, was jailed for contempt on January 8 and remained incarcerated until January 17. While he was in jail he was visited by certain unidentified representatives of the International on unspecified dates (R. 173).

The testimony of a newspaper reporter constitutes the only evidence of activity on the part of representatives of the International on specific dates. The first

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[3] The other major issue concerned the amount of damage, if any, suffered by the City as a result of the strike.

date as to which he testified concerning *any* action by the International was January 17, at which time Brindza addressed a union meeting and made statements which could be construed as supporting the strike (R. 124). He also testified that on January 31 Epps had said the "Cincinnati local will escalate peaceful demonstrations" at business establishments in the city (R. 120); this statement was made before the injunction was broadened to restrain action of that kind (R. 16).

It was stipulated that the International contributed $20,000 to Council 51 during the strike for the relief of hardship among the members of Council 51 as a result of the strike by payments in two installments of $10,000 each on January 27, 1970 and February 4, 1970 (R. 146).

No evidence was offered concerning the relationship between the International and Council 51, their constitutions and bylaws are not in the record, no claim was made or proof offered of a principal-agent relationship between them. This is the sum total of the evidence on which the trial court found appellant International guilty of separate contempts of the January 6, 1970 permanent injunction on thirty-seven days from January 4 to February 9, inclusive.

There was no evidence whatever of any strike activities by either petitioner subsequent to the execution of the Memorandum of Settlement on February 5, 1970. It is uncontradicted that the employees started to return to work on Sunday, February 8, that all were back by the 9th and that all strike activities had ceased as of those dates (R. 140).

3. The Trial Court's Decision and Judgment.

On July 28, 1971, the Court issued its oral decision as follows:

> "In regard to the contemptuous behavior of the striking organizations, evidence having been produced at prior date indicating the strike to be 37 days, the Court hereby levies a fine of $1,000 for each day of the strike equal to the sum of $37,000." (p. 27a *infra*).

At no time prior to the decision of the trial judge had there been any intimation that petitioners were accused of more than one act of contempt, much less thirty-seven separate contempts. In response to questions of counsel, the Court explained that the sum $37,000 was to be distributed *pro rata* among the petitioners (*id.*); that other monies paid by the unions would be credited, and that "the balance in round figures, about $25,800, if possible, will be split between the City of Cincinnati and the County of Hamilton, to be the sum equal to the amount applicable to the City as damages, and the balance to be applicable to the County by way of fines." (p. 28a *infra*).

On September 14, 1971 judgment was entered against the petitioners accordingly (pp. 28a-33a *infra*).

B. Proceedings on Appeal.

The Court of Appeals, Hamilton County, unanimously affirmed the judgment in its entirety. The Supreme Court of Ohio granted discretionary review. Thereafter, the Supreme Court affirmed the judgment of the Court of Appeals in all respects except that it reversed it with respect to the finding that the defendants were in contempt of the permanent injunction on

the two days prior to its issuance (pp. 15a, 20a-21a *infra*). The Court squarely rejected the defendants' claim "that they were denied due process of law in that they were not notified that the proceeding against them involved multiple contempts." (p. 5a *infra*).[4]

The gist of the Court's decision on the constitutional issue was that the defendants were not prejudiced by the absence of such notice:

> "The show cause order here involved apprised the appellants of both the nature of the proceeding (civil contempt) and the reason for the proceeding (violation of the permanent injunction previously entered). That the order did not mention that 37 contempts would be punished did not work prejudice against the appellant union. Each of these separate contempts was the same as the others, i.e., that the appellants conducted a strike in violation of the permanent injunction. Furthermore, appellants were certainly aware of the number of days they remained on strike.
>
> "Appellants strenuously assert that they were prejudiced by lack of notice. Nowhere, however, do they indicate the precise nature of this prejudice. The most that appellants assert is that 'appellants, not having been advised that they were charged with thirty-seven separate contempts, made no effort to defend against such a charge.' This argument is sound so far as it goes, but it

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[4] While the Court did not discuss the issue in terms of the United States Constitution, the federal claim was squarely raised:

> "The constitutional right to due process of law, guaranteed by the Fifth Amendment of the Constitution of the United States, the fundamental concept of fair trial and the governing principle in contempt cases of strict construction in favor of the accused require that this multiple contempt judgment be set aside." (Appellants' brief in the Supreme Court of Ohio, p. 20, quoting *Cooke* v. *U. S.*, 267 U.S. 517, 537).

> does not go far enough. No evidence was introduced or argument advanced to show how appellants would have defended differently had they been fully aware that 37 contempts were involved. Although appellants argue that prejudice could have arisen, they totally fail to demonstrate that prejudice actually arose in this case." (pp. 7a-8a *infra*).

In light of the Court's holding that the show cause order apprised the defendants that the nature of the proceeding was in civil contempt, one additional ruling must be mentioned. The defendants had urged that because a jury may not be had in contempt proceedings the award of damages is a denial of a jury trial provided by Article I, § 5 of the Ohio Constitution which provides for the right to jury in civil cases. In rejecting that contention the Court held in part: "The present case involves both civil and criminal aspects." (p. 11a *infra*, following, *inter alia*, *United States* v. *United Mine Workers*, 330 U.S. 258, 299).

Two Justices would have reversed the judgment outright on the ground that the respondent taxpayer's motion to intervene should not have been granted (pp. 15a-16a *infra*); they therefore reached no other issues. A third Justice was of the opinion that the Trial Court abused its discretion in levying fines for more than a single contempt (pp. 16a-17a *infra*).

REASONS FOR GRANTING THE WRIT

I. The Courts Below Denied Petitioners Due Process of Law in Its Primary Sense.

In *Cooke* v. *United States*, 267 U.S. 517, 537, Chief Justice Taft wrote:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in

> open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation."

In *Morgan* v. *United States,* 304 U.S. 1, 18, Chief Justice Hughes wrote:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one."

It was in this tradition that Chief Justice Burger, writing for a unanimous court, held in *Groppi* v. *Leslie,* 404 U.S. 496, 502-503, that (except where summary disposition is essential) even a legislature must give notice and an opportunity to be heard before it may impose punishment for contempt.

> "Indeed, we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.' *In re Oliver,* 333 U. S. 257, 273 (1948). See, *e. g., Joint Anti-Fascist Committee* v. *McGrath,* 341 U. S. at 143, 164-165, 171-172, 178, 185 (concurring opinions of Black, Frankfurter, Douglas, and Jackson, JJ.); *Cole* v. *Arkansas,* 333 U. S. 196, 201 (1948). We have emphasized this fundamental principle where rights of less standing than personal liberty were at stake. *E. g., Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969); *Morgan* v. *United States,* 304 U. S. 1, 18 (1938); *Grannis* v. *Ordean,* 234 U. S. 385, 394 (1914). In *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306 (1950), the Court stated:
>
> Many controversies have raged about the cryptic and abstract words of the Due Process Clause

> but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. 339 U. S., at 313."

The judgment below cannot be reconciled with "this fundamental principle." It allowed petitioners to be punished both civilly and criminally on thirty-five separate counts of contempt although, in the order to show cause, issued by the Trial Court, they were charged only with a "violation" of the injunction.

The Supreme Court of Ohio concluded that the "notice was clearly sufficient to apprise the appellants of the charge against them and to enable them to prepare a defense" (p. 8a *infra*). But an order to show cause of this generality is insufficient to comply with constitutional requirements. As stated in *United States* v. *Cruikshank,* 92 U.S. 542, 558:

> "It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.' "

This holding was reaffirmed in *Russell* v. *United States,* 369 U.S. 749, as stating "basic principles of fundamental fairness" (*id.* at 765-766) required by the due process clause of the Fifth Amendment (applicable in both civil and criminal proceedings) as well as the Sixth Amendment's guarantee that "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation" (*id.* at 761).

The Ohio Supreme Court's basic premise for the conclusion that the petitioners received sufficient notice was that they had not shown prejudice (pp. 7a-8a *infra*). In so holding, the Court did not "declare a belief that" the failure to give notice "was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24. On the contrary, it imposed on petitioners a burden of demonstrating prejudice which effectively nullifies that constitutional right. The Court stated that petitioners "were certainly aware of the number of days they remained on strike" (p. 7 *infra*). This is, of course, true, but petitioners did not know that "the number of days they remained on strike" would be in issue.

Plainly, the defendant in any case is aware of his actual conduct. But the purpose of giving him notice is to apprise him what conduct is charged to be illegal. It must focus the issues so that he can prepare a defense. In short, if the defendants' own knowledge of the circumstances is sufficient to eliminate prejudice, the constitutional right to notice can hardly survive.

In many cases the existence of prejudice from a lack of notice of the specific elements of the offense charged while real, can only be hypothesized. In the present case, prejudice can readily be shown.

We may usefully begin with the point that the court below stated the petitioners knew—the number of days that they remained on strike. The Trial Court itself was so confused on this that it found defendants guilty of violating the permanent injunction for two days before that injunction was entered, as well as for at least one day (February 9) when the record showed

that all persons had returned to work, and as to which it was *stipulated* that "there was no strike activity going on" (R. 140). The Ohio Supreme Court reversed as to the first two days, but, despite petitioners' specific claim of error, sustained the finding of violations through February 9. In doing so, it ignored this stipulation, as well as the circumstance that due to the generality of the charge, petitioners had no occasion to establish, as a defense with respect to the separate violations found, that they had done everything possible to discontinue the strike after the settlement agreement had been entered into (on February 5).

The courts below were confused also with respect to the nature of the offense. The order to show cause stated squarely that defendants were being charged with "civil contempt" (p. 35 *infra*). The Supreme Court stated, in overruling the objection of inadequate notice, that the "show cause order here involved apprised the appellants of both the nature of the proceeding (civil contempt)" (p. 7a *infra*).[5] Yet the Trial Court imposed mixed civil and criminal penalties on defendants (p. 33a *infra*); and the Supreme Court sustained the denial of a jury trial on the ground that the "present case involves both civil and criminal aspects" (p. 11a *infra*).

The foregoing examples are sufficient, we submit, to establish prejudicial inadequacies of the notice as to both petitioners. But the prejudice to the Inter-

[5] Additionally, some of the individual defendants, who were named in the same order to show cause, were required to testify, and their objections against self-incrimination were overruled *e.g.*, R. 167. This of course, would not be permitted in a criminal prosecution. *Griffin* v. *California*, 380 U.S. 609; *Gompers* v. *Bucks Stove & Range Co.*, 211 U.S. 418, 447-8.

national was particularly severe. Unlike Council 51, the International did not admit that it "conducted a strike in violation of the permanent injunction" (p. 7a *infra*). In defending against that allegation—which the court below recognized was all that the order to show cause charged (*ibid.*)—the International had no reason to put the movant to his proof with respect to the specific day on which one of its representatives first played any role in the strike, or when it received notice of the injunction. The show cause order fairly read made the sole issue as to liability whether the International had participated *at all*. Indeed, since the party who sought the contempt citation had the burden of proof on these elements of each violation, the failure of his able counsel to present such proof is the strongest possible evidence that no one thought it relevant *when* the International received notice and *when* its representatives participated in the strike.

Again, although the Trial Court found both petitioners "guilty of repeated separate contempts of this Court by their own direct violations and aiding and abetting and supporting others to violate this Court's injunction each day from the 4th day of January, 1970, to the 9th day of February, 1970, inclusive" (p. 31a *infra*), it did not identify those violations. This failure to focus on the individual offenses and their elements was prejudicial to both petitioners, but particularly to the International, since he failed to consider when it received notice, and on what days it participated in the strike.

In sum, the proceedings in the Ohio courts have "denied to the [petitioners] 'due process of law'—using that term in its primary sense of an opportunity

to be heard and to defend its substantive right." *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 678 (Brandeis, J.). This, we submit, is sufficient ground for review by this Court. And review is all the more essential because the problem which the present case exemplifies is of recurring importance—as we next show.

II. The Issue Posed in This Case Is of Recurring and General Importance.

"Certainly the history of contempt litigation, especially in regard to labor disputes, prescribes extreme care and insistence on the full indicia of due process in contempt cases." [6] Yet, as this case once again demonstrates, the lower courts, both state and federal, frequently fail to accord defendants elemental procedural rights. It is not that the courts consciously deny the constitutional rights of alleged contemnors; rather, the peculiar nature of the offense creates uncertainties which result in a failure to give effect in contempt proceedings to otherwise well understood requirements of due process. Definitive guidance as to the minimal constitutional requirements in contempt proceedings can be given only by this Court.

a) Statutes which declare an offense ordinarily define the unit of prosecution, or, less frequently, leave the question to statutory interpretation in light of the purpose of that particular statute, and more general principles, see *e.g., Bell* v. *Unted States,* 349 U.S. 81, 82-84. But statutes which authorize courts to punish for contempt of their lawful orders necessarily grant

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[6] *Brotherhood of Loc. Fire & Eng.* v. *Bangor & Aroostook R. Co.,* 380 F.2d 570, 582 (C.A.D.C.), cert. denied on other issues, 389 U.S. 327.

that power in general terms; they could not possibly define the unit of prosecution for all contempts since these are as varied as the subjects of injunctions. While we have no doubt that the courts may thus be granted the power to determine the unit of prosecution for contempts on an *ad hoc* basis, that power creates a special obligation to provide notice as to what the court will treat as the unit of prosecution in each case. Unless the pleading which initiates the contempt proceeding (such as the order to show cause) gives such notice, the defendant will remain in the dark until judgment, as to the elements of the offense and, in most instances, of the extent of his potential loss of liberty or property. This problem is of growing importance because an increasing number of regulatory statutes both state and federal are enforced by judicial orders either at the behest of an administrative agency, or some other public or private party.

b) We have shown thus far that basic due process principles require that an order to show cause (or other charge which initiates the proceeding) must specify the number and nature of the contempts charged. This Court's determination to resolve certain questions in *Codispoti* v. *Pennsylvania,* (#73-5615), cert. granted December 3, 1973, 42 U.S.L.Wk. 3333, may provide an additional basis for the same conclusion.

The petitioner in that case was convicted without a jury trial of numerous counts of contempt for incidents arising in a criminal trial at which he was a co-defendant. In support of the first question presented he argues, in part, that the right to a trial by jury for contempt depends on the aggregate sentence rather than the sentence on each count. (Petitioner's broader

claim on the same point is that related contempts create a continuing offense and may not therefore, be aggregated at all.) It is therefore possible—it would be inappropriate for us to opine that it is likely—that this Court, in accord with *United States* v. *Seale*, 461 F.2d 345, 353 (C.A.7), will decide that the States may constitutionally treat each incident as a separate contempt, but that the right to a jury depends on the possible total sentence, and not on the possible sentence for each count.[7] In that event, the precepts of *Baldwin* v. *New York*, 399 U.S. 66 (holding that it is the maximum possible penalty which determines the defendant's right to a jury trial), would strongly militate in favor of a holding that a Court which intends to aggregate several counts of contempt must so declare at the beginning of the proceeding, at least where there is a maximum possible sentence on each count.[8] Certainly, the orderly administration of justice demands that result. If the defendant's right to a jury trial is not determined until after trial, the unfortunate choice open at that point is between imposition of a sentence which the court believes is unjustly light, or granting the defendant a new trial before a jury. See the separate opinion of Justice Harlan in *Cheff* v. *Schnackenberg*, 384 U.S. 373, 382.

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[7] Cf. *Taylor* v. *Hayes*, No. 73-473, in which certiorari was also granted on December 3, 1973, 42 U.S.L.Wk. 3333, where the petitioner contends that, in order to defeat his right to trial by jury, consecutive sentences on several counts of contempt were reduced to concurrent terms totalling six months.

[8] Where, as in *Cheff* v. *Schnackenberg*, 384 U.S. 373, and *Bloom* v. *Illinois*, 391 U.S. 194, there is no maximum punishment for any count of criminal contempt, it is necessary "to look to the penalty actually imposed" in determining the right to trial by jury. See *id.* at 211.

In sum, both the principles stated in this Court's decisions culminating in *Groppi* v. *Leslie, supra,* and the grant of certiorari in *Codispoti* mandate review of the Ohio Supreme Court's decision herein.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,

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